BEFORE THE

ORIGINAL

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Market Entry and Regulation of	)	IB Docket No. 95-22
Foreign-affiliated Entities	)	RM-8355
	)	RM-8392

To: The Commission

COMMENTS OF AMERICATEL CORPORATION

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SUMMARY

In these Comments, AmericaTel Corporation addresses several aspects of the Commission's notice of proposed rule making in its proceeding regarding Market Entry and Regulation of Foreign-affiliated Entities. In July 1994, the Commission authorized a foreign carrier (specifically, Empresa Nacional de Telecomunicaciones, S.A., a Chilean long distance carrier) to acquire through a subsidiary a substantial ownership interest in AmericaTel Corporation, and thereby enter the U.S. market. The Commission's analysis of the proposed transaction was comprehensive and fully litigated, and certain extraordinary conditions were imposed.

The current rulemaking proceeding was foreshadowed in the deliberations over the AmericaTel Corporation transaction; however, the outcome of that proceeding was not conditioned on the actions the Commission may take generically on the subject of foreign carrier entry into U.S. markets. Now, AmericaTel urges the Commission to exempt it from the operation of any conditions or requirements that are adopted herein to the extent that such rules, as is to be expected with rules of general applicability, are different from the specifically-tailored conditions the Commission imposed in its AmericaTel Corporation decision just last year.

In addition, AmericaTel supports the Commission's proposal to exclude resellers of IMTS service from the entry requirements, and supports as well the continuation of the policies on private line resale. In the last regard, the Commission

should harmonize its current and prospective policies, but only on a going forward basis; in other words, the new policies should not be permitted to disturb the findings the Commission has already been made or asked to make with respect to equivalent opportunities in such places as Canada and the United Kingdom.

Next, AmericaTel opposes the proposal to require affiliates of foreign carriers to file (and update quarterly) lists of the accounting rates of their foreign affiliates between that affiliate's home country and all other countries in the world. There is no rational nexus between the report and the stated objective, and the intrusiveness of the requirement (even if it can be complied with by a carrier that is not controlled by the foreign carrier) will impose a barrier to entry that will redound to the detriment of the Commission's policy goals.

Finally, AmericaTel questions the Commission's apparent decision not to include an evaluation of investments by U.S. carriers in foreign carriers within its regulatory ambit. This is a mistake that may impair the Commission's ability to foster the development of competitive opportunities for U.S. carriers.

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AmericaTel Corporation ("AmericaTel"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding, Market Entry and Regulation of Foreign-affiliated Entities, FCC 95-53 (released February 17, 1995) ("NPRM").

INTRODUCTION

As noted in the NPRM, AmericaTel is a U.S. facilities-based carrier that is ultimately owned in substantial part by Empresa Nacional de Telecomunicaciones, S.A. ("ENTEL-Chile"), a Chilean long distance carrier. NPRM, FCC 95-53, slip op. at ¶ 13. An affiliate of ENTEL-Chile, ENTEL International B.V.I. Corporation, was authorized to acquire control of AmericaTel just nine months ago, after an exhaustive evaluation of the state of telecommunications competition in Chile. Id. See also AmericaTel Corporation, 9 FCC Rcd 3993 (1994). Several extraordinary conditions were imposed on AmericaTel in the AmericaTel Corporation decision, and

AmericaTel has complied with those conditions. Inasmuch as the Commission is proposing in the instant proceeding to replace with a standardized set of procedures and regulations the ad hoc evaluation of ENTEL-Chile's role in the Chilean marketplace and ability to discriminate on the U.S.-Chile route in favor of AmericaTel (or against unaffiliated U.S. carriers), AmericaTel has a unique and substantial interest in this proceeding.

In these comments, AmericaTel notes first that the Commission is not disavowing its market-entry determination in AmericaTel Corporation. Insofar as it is to be expected that prophylactic regulations intended for general applicability are likely to be different from those developed on a subjective, ad hoc basis in an adjudicative proceeding, AmericaTel calls upon the Commission to exempt it from any regulations that are developed in this proceeding that impose conditions on the entry of ENTEL-Chile into the U.S. market that differ substantially from the conditions adopted last Summer in AmericaTel Corporation.

In addition, AmericaTel offers its views on several aspects of the Commission's regulatory proposals. For example, AmericaTel supports the Commission's tentative decision not to impose entry restrictions on foreign carriers that merely resell switched services. NPRM, FCC 95-53, slip op. at ¶ 74. It also believes that the Commission should not harmonize its standards for evaluating equivalent opportunities with respect to the resale of private lines -- at least it should not do so in any way that would change the determinations that have already been

made for Canada, the United Kingdom, and such other countries that have received or may receive equivalency determinations under the current standards prior to the effective date of any regulations emanating from this proceeding. See id. at ¶¶77-78.

AmericaTel, however, expressly opposes the Commission's proposal to require that the accounting rates of foreign carriers with all other countries (i.e., between the carrier's country of origin and any country other than the U.S.) be filed with the Commission. See NPRM, FCC 95-53, slip op. at ¶¶ 87-90. The Commission has provided no valid justification for such an intrusive requirement, and its net effect is likely to be a reduction in competitive alternatives for U.S. customers as foreign carriers elect to avoid the U.S. market as a result of the overreaching of the Commission's regulations.

DISCUSSION

I. AmericaTel Should Be Exempted From Any Regulations Of General Applicability Developed In This Proceeding That Differ Substantially From Those Imposed Upon AmericaTel And ENTEL-Chile In The AmericaTel Corporation Decision.

First and foremost, AmericaTel urges the Commission to grandfather in the terms and conditions that were imposed on the ENTEL-Chile's entry into the U.S. market in AmericaTel Corporation. In that proceeding, the Commission conducted a thorough and comprehensive review, and adopted a set of requirements that was

narrowly tailored to the specific facts before it. The AmericaTel Corporation decision is of recent vintage, and remains in full effect.

In its NPRM, the Commission is not seeking to disavow its actions in AmericaTel Corporation or any of the other significant cases on the issue of foreign carrier entry. See NPRM, FCC 95-53, slip op. at ¶¶ 10-11. Instead, it is seeking "to articulate standards to provide more coherent principles to guide [the Commission's] deliberations concerning individual cases." Id. at ¶ 25. Because this review has already been conducted with respect to ENTEL-Chile, AmericaTel and ENTEL-Chile should not be subjected to potential restrictions that, as a result of the need to arrive at prophylactic standards of general applicability, are likely to differ substantially from the ones developed specifically for application to ENTEL-Chile's entry into the U.S. market.

There would be no harm either to the public or to the philosophy underlying the Commission's current regulatory initiative if AmericaTel's request were to be granted. The Commission's action approving the decision is less than one year old, and was not the subject of petitions for reconsideration by either of the main litigants. The Commission was well aware of the fact that AT&T Corporation ("AT&T"), which had petitioned to deny the applications at issue in AmericaTel Corporation, had also filed a petition for rule making seeking the type of market entry standard for foreign carriers that is at issue here. It held, however, that the transaction was to be evaluated under the current standards, and "not on policies

parties urge us to adopt prospectively." AmericaTel Corporation, 9 FCC Rcd at 3996.

Furthermore, the reasoning process the Commission went through in AmericaTel Corporation is reflected in the current proposals. Thus, the terms and conditions applied to AmericaTel, though specific and fact-dependent, are actually the progenitors of many of the current proposals. Applying different standards and conditions to AmericaTel than those that were deemed satisfactory in AmericaTel Corporation would serve no purpose, and would undermine the confidence all parties to the transactions approved in that proceeding placed in the sanctity and permanence of the Commission's processes.

In short, the Commission should expressly reaffirm its factual findings and rulings from AmericaTel Corporation, and not reevaluate the entry of ENTEL-Chile into the U.S. market under different standards of general applicability. In other words, AmericaTel is urging the Commission to exeercise its prerogative by declining to modify the terms of its ruling in AmericaTel Corporation (see 9 FCC Rcd at 4005). Of course, in the unlikely event that the record of this proceeding reveals that there is no longer a need for some or all of the extraordinary terms and conditions imposed upon AmericaTel, principles of fundamental fairness require that the conditions applied in AmericaTel Corporation should be relaxed or eliminated to a commensurate degree.

II. AmericaTel Supports Certain Of The Commission's Specific Proposals And Recommendations, And Opposes Others.

A. The Commission Should Maintain Its Policy of Open Entry For International Resale Of Switched Services.

In the NPRM, the Commission tentatively concluded that it should maintain its current open entry policy for international resale of switched services. In other words, it proposed to continue its presumption that even U.S. carriers that are affiliated with foreign carriers should be regulated as nondominant in their provision of resold international message telephone service. NPRM, FCC 95-53, slip op. at ¶ 74.

AmericaTel supports this determination, and agrees that unless proven otherwise, "there is no competitive harm in permitting unlimited foreign-carrier entry for switched resale, even to affiliated countries." Id. The facilities being resold will have to be in compliance with whatever policies and regulations are adopted in this proceeding; evaluating the IMTS resale applications of affiliates of foreign carriers would thus be a needless exercise, and delay the advent of necessary and beneficial competition.

B. The Commission Should Permit Open Entry Into The Resale Of Noninterconnected Private Lines, And Should Continue Its Current Policy On The Resale Of Interconnected Private Lines To Provide Switched Services.

AmericaTel supports the Commission's proposal to continue its open entry policy for foreign-carrier resale of noninterconnected private lines. See NPRM, FCC 95-53, slip op. at ¶ 76. It agrees that such entry causes no competitive harm.

Similarly, AmericaTel supports the Commission's proposal to continue its current policy of limited entry by carriers (foreign-affiliated or not) that resell private lines interconnected to the public-switched network. Id. at ¶ 77. AmericaTel has no objection to the harmonization of the "equivalency" standard pursuant to which applications to resell private lines to provide switched services are now subject, with the new entry standards to be adopted herein, provided, however, that the "harmonization" process is not treated as an opportunity to revisit any equivalency determinations that have been made or requested prior to the effective date of the new rules, and that the processing of such requests is in no way delayed or deferred pending the effectiveness of such rules.

AmericaTel opposes AT&T's recommendation that the Commission should adopt cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries. See id. at ¶ 78. In AmericaTel's view, AT&T's proposal, which would present resale applicants with an exceedingly high hurdle to overcome, is both obstructionist and dilatory, and

presents no countervailing public benefit. The Commission is taking other, more measured and reasonable, steps to exert downward pressure on international accounting rates, and these efforts are meeting with success.

Finally, AmericaTel believes that once a carrier has received a Section 214 authorization to provide switched services via resold private lines, it should be permitted to add any countries for which an "equivalent opportunities" (or follow-on) finding has been made without further authorization or notification. See id. at ¶ 79. Such an approach comports with the expectation that more markets will become open to competition over time, and will enable the benefits of competition to be distributed more expeditiously.

C. AmericaTel Supports The Modest Relaxations Of The Regulatory Burdens Imposed Upon Affiliates Of Foreign Carriers, But Strongly Opposes The Commission's Proposal To Require Submission Of All Accounting Rates Of Affected Foreign Carriers.

The Commission requested comment on several matters relating to the manner in which affiliates of foreign carriers would be regulated. For example, it inquired whether it should eliminate the requirement that dominant foreign-affiliated carriers must file tariffs on 45 days' notice (with cost support), and replace it with the "streamlined" regulation that permits tariffs to be filed on 14 days' notice without cost support. NPRM, FCC 95-53, slip op. at ¶ 85. The Commission also questioned whether its requirement for prior approval before circuits are added or discontinued on

dominant routes would remain necessary under the entry-regulation scheme contemplated in this proceeding. Id.

AmericaTel believes that the regulations should be streamlined to the greatest possible extent. If there is to be a threshold test for the first time on entry into U.S. markets by foreign carriers, those carriers and their affiliates who cross the threshold should not be saddled with extra burdens, as effective parity will already have been found to exist. Under these circumstances, the imposition of additional regulatory requirements on affiliates of foreign carriers would send a message to the rest of the world that it is acceptable to set dual standards for carriers -- i.e., exactly the message that the Commission is attempting to cancel. Only regulations that apply equally to affiliated and unaffiliated carriers should apply to carriers that receive authorizations.

It is completely inappropriate for the Commission to be suggesting that new reporting or certification requirements should be imposed on affiliates of foreign carriers. See NPRM, FCC 95-53, slip op. at ¶¶ 86, 87-90. In particular, AmericaTel strongly opposes the Commission's proposal to require that any affiliated facilities-based carrier file with the Commission, and update quarterly, "a complete list of the accounting rates that its foreign carrier affiliate maintains with all other countries." Id. at ¶ 87. According to the Commission, this information will enable it to determine whether there is a "noncost-based disparity between the rates maintained

by that carrier with U.S. carriers and the rates it maintains with its other foreign correspondents." Id. at ¶ 88.

This proposal, if adopted, will act as a real barrier to entry by foreign carriers, and will provide foreign governments and carriers with the excuse to exclude or inhibit U.S. carriers seeking toeholds abroad. First, it is folly for the Commission to assume that a U.S. carrier that has five or ten percent of its stock owned by a foreign carrier (most likely even then through one or more intermediaries) will have the access to the sensitive and farreaching data the Commission is requesting. If the penalty for noncompliance is decertification, the Commission will not have long to wait before there are no affiliates of foreign carriers in the U.S. market.

In addition, the burden associated with the task of compiling such a list and maintaining it, even if otherwise bearable, is extraordinary. Because affiliates of foreign carriers will have to meet the Commission's considerable entry test to commence service in the first instance, it would be inequitable to foist upon them the additional and costly responsibility of the data gathering requirement. The costs would be passed along to ratepayers, thereby affecting the competitiveness of the offering.

On balance, the intrusiveness of the requirement is much greater than the stated information-gathering objective; indeed, the Commission does not even state how it would use the reports it is proposing to require. The question of confidentiality and the proprietary nature of the data is but one important consideration; the

Commission's right to demand data pertaining to third parties' extra-U.S. arrangements is another. Again, this data would be supplied only by carriers that have passed the new entry threshold -- i.e., carriers that have demonstrated the competitiveness of their affiliates' home markets. The Commission does not even state how it would use the reports it is proposing.

In short, AmericaTel cannot overemphasize its opposition to the Commission's proposed information-gathering requirement (despite the fact that the requirement, even if generally imposed, should not apply to AmericaTel for the reasons identified in Section I above). The impact on the level of competition, and therefore on the public interest, would be profound. If AT&T and the other major U.S. carriers want this information, let them gather it the old fashioned way; the Commission should not hand it to them on a silver platter.

D. To Achieve Its Stated Regulatory Objectives, The Commission May Have To Evaluate Investments By U.S. Carriers In Foreign Carriers, Not Just Foreign Carrier Investment.

Under current policy, the Commission applies the following standard to determine whether a U.S. carrier is "affiliated" with a foreign carrier:

> Affiliation is defined to include: A controlling interest by the applicant, or by any entity that directly or indirectly controls or is controlled by it, or that is under direct or indirect common control with it, in a foreign carrier or in any entity that directly or indirectly controls a foreign carrier; or a controlling interest in the applicant by a

> foreign carrier, or by any entity that directly or indirectly controls a foreign carrier.

47 C.F.R. § 63.01(r)(1)(i). The control analysis thus runs two ways: control of a U.S. carrier by a foreign carrier, and control of a foreign carrier by an applicant.

Now, the Commission is considering whether to attach the "affiliation" label in cases where the interest held in an applicant by a foreign carrier is less than controlling; it cites concerns "that a less-than-controlling interest by a foreign carrier in a U.S. carrier could give the foreign carrier the financial incentive to favor its U.S. affiliate." NPRM, FCC 95-53, slip op. at ¶ 54. It tentatively concludes that a new standard is needed, and proposes "to adopt a definition of affiliation that includes cases where a foreign carrier acquires a direct or indirect ownership interest of a certain minimum percentage level, or a controlling interest at any level, in a U.S. carrier." Id. at ¶ 57.

AmericaTel is concerned that what was a two-way analysis -- i.e., applicant into foreign carrier *and* vice versa -- is now being recast as an examination only of foreign carrier investment in U.S. carriers. If so, something is amiss. Clearly, if a major U.S. long distance carrier purchases 5%, 10%, 25% or some other non-controlling equity stake in a foreign carrier (providing in the process much needed cash or access to equipment and services), that foreign carrier has a powerful incentive to favor its U.S. investor. The impact on competition can be profound.

At a minimum, then, it is necessary for the Commission to apply to U.S. carrier investment (i.e., investment by a Section 214 applicant or any party controlled by, in control of, or under common control with that applicant) in foreign carriers the same standard that it adopts for application to foreign carrier investment in U.S. carriers.

As for the benchmark investment level to be selected, AmericaTel believes that there is no reason to modify the controlling interest level from the current rules. If the Commission is concerned about the prospect of influence from a non-controlling stockholder that is a foreign carrier, it should require all interests concerned to file a "no special concessions" certificate; undergoing a full blown entry analysis for anything less than control by, of, or with a foreign carrier is overkill. If a non-controlling benchmark level is to be selected, that level should be at least 25%, and opportunities to avoid the entry assessment should be provided to companies with greater than 25% foreign carrier ownership that also have single majority shareholders that are not affiliated with foreign carriers. Any level lower than 25% would inhibit the ability of smaller U.S. entrants into the communications marketplace to lure the investments that they will need to grow.

As a final matter, AmericaTel supports the Commission's proposal not to include within the definition of "affiliate" non-equity business relationships between carriers, and most co-marketing arrangements. See NPRM, FCC 95-53, slip op. at ¶ 63. Nevertheless, AmericaTel believes that the Commission's policy objectives require the filing of any agreements a U.S. carrier/applicant enters into with a foreign

carrier, provided that U.S. carrier/applicant and the foreign carrier have either a correspondent or ownership relationship. The Commission and the public must have an opportunity to assess whether a co-marketing or other similar joint venture agreement is a surrogate for or otherwise impacts upon the international accounting rates or settlements process.

CONCLUSION

On the basis of the foregoing discussion, AmericaTel urges the Commission to exempt AmericaTel from any conditions or requirements in this proceeding that are more stringent -- as a result of their nature are rules of general applicability -- than the conditions and requirements the Commission imposed in its AmericaTel Corporation decision last July. AmericaTel also urges the Commission not to implement its proposal to require U.S. carriers affiliated with foreign carriers that are dominant on one or more routes to file quarterly reports showing that foreign carrier's accounting rates with every other nation.

The objective of this proceeding is to promote and protect the competitiveness of U.S. carriers in the global marketplace; it is not to insulate U.S. carriers from foreign competition at home. The Commission should look carefully at its proposed regulatory requirements, and reject those that stray from the principal objectives the Commission established for itself at the outset of the proceeding.

Respectfully submitted,

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